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JUN 24 1983

ALEXANDER L. STEVAS,  
CLERK

IN THE

**Supreme Court of the United States**

October Term, 1982

WILLIAM A. MERTSCHING,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

As reported in:

WILLIAM A. MERTSCHING,

*Plaintiff-Appellant,*

v.

No. 82-2016

UNITED STATES OF AMERICA,

*Defendant-Appellee,*

and

WILLIAM A. MERTSCHING,

*Plaintiff-Appellant,*

v.

No. 82-2485

UNITED STATES OF AMERICA,

*Defendant-Appellee.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

WILLIAM A. MERTSCHING

*Petitioner/Pro Se*

1224 Bannock Street

Denver, Colorado 80204

(303) 623-3490

## QUESTIONS PRESENTED FOR REVIEW

Is not review warranted when questions of law have not yet been ruled on?

Is not review warranted when decisions of the Supreme Court of the United States have been ignored?

Is not review warranted when petitioner's actions are controlled by Grand Jury investigations, and statutory required court filings over which petitioner has not control?

Is not review warranted when prior court cited case law includes memorandum decisions of legislative courts?

## PARTIES TO THIS PROCEEDING

The caption of this case, as presented, contains the names of all parties.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1982

-----x

WILLIAM A. MERTSCHING,

Petitioner,

v.

UNITED STATES OF AMERICA,

-----x

As reported in:

WILLIAM A. MERTSCHING,

Plaintiff-Appellant,

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NO. 82-2016

UNITED STATES OF AMERICA,

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Plaintiff-Appellant,

v.

NO. 82-2485

UNITED STATES OF AMERICA,

Defendant-Appellee,

-----x

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit entered on April 12, 1983.

#### CITATIONS TO OPINIONS BELOW

The Opinion of the United States Court of Appeals Tenth Circuit is Slip Opinion, and is set out in Appendix A *infra* at P. A1.

#### JURISDICTION

The Judgment of the Tenth Circuit was entered on April 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1291 and 28 U.S.C. Sec. 1651(a).

### STATEMENT OF THE CASE

The Petitioner here was a statutorily mandated plaintiff, originally in the United States District Court for the District of Colorado. An appeal to the Court to Appeals for the Tenth Circuit resulted in one opinion, see *infra* Appendix A. The United States District Court for the District of Colorado issued no opinion in either case, and only issued a combined Findings of Fact and Conclusions of Law after No. 82-2016 was in appeal, none of which are included in the Opinion of the Tenth Circuit (see Appendix B).

### REASONS FOR GRANTING THE WRIT

The wording of the Constitution of the United States has not changed since its adoption in 1776, nor has any of the wording of the first nine amendments, constituting the Bill of

Rights, been changed since their adoption.

The Supreme Court of the United States has continuously stated its agreement as to what these words of the Constitution of the United States do say. There is no reason to believe that the meaning of these words have changed.

The Supreme Court of the United States early held that the Fourth and Fifth Amendments applied to both civil and criminal cases. The actual language of the Supreme Court can be found in Boyd v. United States, 116 U.S. 616, 629, 630, 6 S. Ct. 524, 531, 532, 29 L.Ed. 746 (1886). The Supreme Court said in Norwood v. Harrison, 413 U.S. 455, 37 L Ed 2d 723, 93 S. Ct. 2804 "No one can be required, consistent with due process, to prove the absence of violation of law."



The importance and purpose of the Constitution was clearly made by Jefferson who said, "Let no more be said of confidence in man, but bind him down with the chains of the Constitution." Those chains were meant to apply to all who wield the delegated powers of government including the Courts.

Petitioner points out to this Court that the Sixteenth Amendment does not include any enforcement provisions, but as the Supreme Court has stated many times, that "income subject to taxation under the Corporation Excise Tax Act of 1909 and under the 16th Amendment is the same," "that only income (gain) is taxable without apportionment, nothing else."

In Eisner v. Macomber, 252 U.S. 189 (1920) the Supreme Court is quoted as follows "Congress may not, by

any definition it may adopt, conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone, that power can be lawfully exercised." 40 S.Ct. at 193.

#### CONCLUSION

The Motions to Dismiss should not have been granted until the Questions of Law had been adjudicated. Especially since the Supreme Court ruling as late as 1973 that "no one can be required, consistent with due process, to prove the absence of violation of law."

The basic question is whether or not the statute which Congress did enact will permissibly bear a construction rendering it free from constitutional defects. The Court must consider

possible applications besides the one at Bar. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes. The petitioner has a hazard of being prosecuted for knowing but guiltless behavior.

For the reasons set forth herein, the Petitioner respectfully prays that this Honorable Court will grant the Writ to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted

WILLIAM A. MERTSCHING  
Petitioner/Pro-Se  
1224 Bannock Street  
Denver, Colorado 80204

(303) 623-3490

## APPENDIX

4-12-83

82-2016

**APPENDIX A**

**UNITED STATES COURT OF APPEALS**

**For the Tenth Circuit**

**Slip Opinion**

APPENDIX A

F I L E D  
United States Court  
of Appeals Tenth  
Circuit  
Apr. 12, 1983  
HOWARD K. PHILLIPS  
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

---

WILLIAM A. MERTSCHING,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No.82-2016
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellee.	)	

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Appeal from the United States  
District Court  
For the District of Colorado  
(D. C. No. 81-K-1391)

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Submitted on the briefs pursuant to  
Tenth Circuit Rule 9:

William A. Mertsching, pro se.

Glen L. Archer, Jr., Assistant Attorney General, Michael L. Paup, Carleton D. Powell, and Murray S. Horwitz, Attorneys, Tax Division, Department of Justice, Washington, D.C. for Defendant-Appellee.

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Before SETH, Chief Judge, BARRETT and MCKAY, Circuit Judges.

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PER CURIAM.

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This three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

William A. Mertsching appeals a federal district court order dismissal his 26 U.S.C. § 6694(c)<sup>1</sup> suit

---

1. Where a tax preparer wishes to have refunded penalties assessed for the negligent or intentional disregard of revenue rules, 26 U.S.C. § 6694(c)(2) requires him to initiate a proceeding in the district court for a determination of his liability.

against the United States for failing to comply with a discovery order.

In December 1980, Mr. Mertsching, a tax preparer as defined by 26 U.S.C. § 7701(a)(36), was assessed two \$100 penalties by the Internal Revenue Service (IRS) under 26 U.S.C. § 6694(a) for negligently or intentionally disregarding revenue rules and regulations in preparing tax returns. The IRS contended that the penalties were imposed because Mr. Mertsching prepared returns which sought to assign income to third persons by means of family equity trusts. Such assignments have been disallowed under established case law.<sup>2</sup> Following the procedures set forth in 26 U.S.C. § 6694(c), Mr. Mertsching paid

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2. *Gran v. Comm'r*, 664 F.2d 199 (8th Cir. 1981); *Vnuk v. Comm'r*, 621 F.2d 1318 (8th Cir. 1980); *Markosian v. Comm'r*, 73 T.C. 1235 (1980); *Wesenberg v. Comm'r*, 69 T.C. 1005 (1978).



fifteen percent of the assessed penalties and filed the instant action for a determination of his liability.

On June 15, 1982 the United States served a notice of deposition upon Mr. Mertsching. Mr. Mertsching filed an objection to the request for deposition contending that the penalties were imposed arbitrarily, that 26 U.S.C. § 6694 was facially unconstitutional, and that a deposition would violate his Fifth Amendment right against self-incrimination. The court did not rule on the motion prior to the scheduled deposition. Consequently, Mr. Mertsching appeared at the deposition but asserted the Fifth Amendment and refused to answer any questions.

Thereafter, the United States filed a motion to compel discovery. After conducting a hearing on the issue,

the court granted the motion and advised Mr. Mertsching that the case would be dismissed if he did not appear and respond to questions during the deposition.

Despite the admonition, Mr. Mertsching refused to answer any questions during the rescheduled deposition. Consequently, the United States moved to dismiss the suit for failure to comply with the court's discovery order. The court again conducted a hearing during which Mr. Mertsching testified that he could not be compelled to be a witness against himself. The court granted the motion and dismissed the case with prejudice.

If a party fails to obey a court order to provide discovery, the court may dismiss the action. Fed.R.Civ.P. 37(b)(2)(C). The imposition of sanctions is within the trial

court's discretion and will not be disturbed on appeal unless the court has abused its discretion. Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976); Brown v. McCormick, 608 F.2d 410 (10th Cir. 1979).

Mr. Mertsching contends, inter alia, that the 26 U.S.C. § 6694(c) proceeding is criminal in nature and that, therefore, the Fifth Amendment right against self-incrimination was available to insulate him from deposition. The Supreme Court has held that the right against self-incrimination applies only in situations where a responsive answer to the question or an explanation of why it cannot be answered would expose the claimant to prosecution for a federal crime. Hoffman v. United States, 341

U.S. 479 (1951). Mr. Mertsching fears prosecution only under 26 U.S.C. § 6694. However, the penalties set forth in § 6694(a) are civil, not criminal, penalties. The legislative history of 26 U.S.C. § 6694 indicates that the statute was to be interpreted in a manner similar to 26 U.S.C. § 6653 which imposes penalties for the intentional or negligent disregard of rules and regulations by taxpayers on their own returns. 1976 U.S. Code Cong. & Ad. News (94 Stat.) 4188. The courts have consistently interpreted the § 6653 proceeding and penalties as civil in nature. *Considine v. United States*, 683 F.2d 1285 (9th Cir. 1982); *Raley v. Commissioner*, 676 F.2d 980 (3d Cir. 1982); *Gilbert v. Commissioner*, 675 F.2d 1083 (9th Cir. 1982); *United States v. University Savings Association*, 666 F.2d

312 (5th Cir.), cert. denied, 102 S.Ct. 2905 (1982); Fontneau v. United States, 654 F.2d 8 (1st Cir. 1981); Ruidoso Racing Association, Inc. v. Commissioner, 476 F.2d 502 (10th Cir. 1973). The § 6694 proceeding and penalties, then, too are civil. Accordingly, the fifth Amendment was not properly invoked by Mr. Mertsching, and the district court did not abuse its discretion in dismissing the action.

We have reviewed Mr. Mertsching's additional contentions and find them to be without merit.

AFFIRMED. The mandate shall issue forthwith.

APPENDIX B

F I L E D  
United States District  
Court  
Denver, Colorado  
Jan. 26, 1983  
JAMES R. MANSPEAKER  
Clerk  
By.....

United States Court of Appeals  
Tenth Circuit  
Office of the Clerk  
C404 United States Courthouse  
Denver, Colorado 80294

HOWARD K. PHILLIPS  
Clerk

Telephone  
(303) 837-3157  
(303) 327-3157

Mr. James R. Manspeaker  
Clerk, U.S. District Court  
Room C-145  
U.S. Courthouse  
Denver, CO 80294

Re: 82-2485, Mertsching v. U.S.A.  
(D.Ct. #80-1535-K)

Dear Mr. Manspeaker:

Enclosed is a certified copy of an order entered to day dismissing the captioned case pursuant to Rule 15 of the Rules of the United States Court of Appeals for the Tenth Circuit. This shall constitute the mandate of this

Court. You will file this mandate in the records of your Court immediately upon receipt of it by direction of this Court.

Enclosed is a receipt for you to sign and return to this office.

Yours very truly,

HOWARD K. PHILLIPS, Clerk

slg

Enclosures

cc: Cecil A. Hartman, Attorney, 180 East  
Hampden #214, Englewood, CO 80110  
William Bower, Tax Division, Department of Justice, Washington, D.C.  
20530

A11

ENTERED  
ON THE DOCKET

Jan 26, 1983

JAMES R. MANSPEAKER  
CLERK

By.....

A true copy  
Teste

Howard K. Phillips  
Clerk, U.S. Court of  
Appeals, Tenth Circuit

By

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Deputy Clerk



F I L E D  
United States District  
Court  
Denver, Colorado  
Jan. 26, 1983  
JAMES R. MANSPEAKER  
CLERK  
By.....

No. 82-2485

NOVEMBER TERM - JANUARY 26, 1983

Before Howard K. Phillips, Clerk

WILLIAM A. MERTSCHING,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellee.	)	

It is ordered that the captioned appeal is hereby dismissed for lack of prosecution pursuant to Rule 15 of the Rules of the United States Court of Appeals for the Tenth Circuit.

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HOWARD K. PHILLIPS, Clerk